

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 21, 2023

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. DEVON ALLEN WALL

**Appeal from the Circuit Court for Cheatham County
No. 17901 David D. Wolfe, Judge**

No. M2021-00911-CCA-R3-CD

The Defendant, Devon Allen Wall, pleaded guilty to one count of aggravated robbery and was convicted by a jury of two counts of aggravated kidnapping related to the same incident. On appeal, the Defendant challenges the sufficiency of the evidence supporting his aggravated kidnapping convictions and challenges the trial court’s refusal to deliver a special jury instruction. Relative to his sufficiency challenge, the Defendant contends that there was no significant confinement or removal of the victims and that the aggravated kidnappings were incidental to the underlying crime of aggravated robbery. Regarding his second challenge, the Defendant contends that the requested jury instruction concerning “relatively trivial restraints” provided crucial guidance for the jury on Tennessee’s aggravated kidnapping statute. Following our review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

KYLE A. HIXSON, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., and MATTHEW J. WILSON, J., joined.

Bernard McEvoy (on appeal), Nashville, Tennessee, and Leonard Belmares, II (at trial), Dickson, Tennessee, for the appellant, Devon Allen Wall.

Jonathan Skrmetti, Attorney General and Reporter; Caroline Weldon, Assistant Attorney General; Ray Crouch, District Attorney General; and Margaret F. Sagi and David W. Wyatt, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

On May 27, 2016, the Defendant entered Smiley's Hilltop Market in Cheatham County, Tennessee, armed with a rifle, and held two customers, Connie Garcia and Johnathan Nickens, at gunpoint while he robbed the cashier, Jessica Luna. Thereafter, a Cheatham County grand jury indicted the Defendant for one count of aggravated robbery of Ms. Luna, *see* Tennessee Code Annotated section 39-13-402, and two counts of especially aggravated kidnapping of Ms. Garcia and Mr. Nickens, *see* Tennessee Code Annotated section 39-13-305. The Defendant pleaded guilty to aggravated robbery and proceeded to trial by jury on August 15-16, 2018, on the especially aggravated kidnapping counts.

At trial, Ms. Luna testified that on May 27, 2016, she was working as a cashier at Smiley's Hilltop Market. At approximately 1:20 p.m., while Ms. Luna was assisting Ms. Garcia, the Defendant entered the store and said, "[G]ive me all of your money." At first, Ms. Luna's view of the Defendant was obstructed, and she believed that another customer had entered the store and was joking with her. However, when Ms. Garcia moved aside, Ms. Luna saw the Defendant holding a rifle. The Defendant again said, "[G]ive me all of your money and all of your cigarettes[,] and threw a white bag on the counter. Ms. Luna asked the Defendant which cigarettes he wanted, and he responded, "Marlboros." She retrieved five cartons of Marlboro cigarettes and approximately \$1,024 from the cash register and placed them into the bag. Ms. Luna testified that during this time, the Defendant was pointing the rifle back and forth between herself and Ms. Garcia. She said that when Mr. Nickens walked out of the restroom, the Defendant ordered Mr. Nickens to stand beside Ms. Garcia. A soundless recording of the incident showing three different angles was played for the jury and entered as an exhibit.

Ms. Luna stated that she immediately called 911 after the Defendant left. She reported that she had been robbed by a white male with a rifle who was wearing a "green camo" ski mask. She also reported the Defendant had driven toward Dickson County in a small Nissan truck with a multi-colored tailgate and a "taped up" license plate. The 911 call was played for the jury and entered as an exhibit.

Ms. Luna acknowledged that the Defendant said that he did not want to hurt anyone and never fired the rifle. She affirmed that neither she, Ms. Garcia, nor Mr. Nickens were locked in a room or removed from the building and that Ms. Garcia was ordered to move only a short distance.

Ms. Garcia testified that while she was paying for her purchase at Smiley's Market, she heard somebody say, "[G]ive me all of your money." The Defendant then shoved her toward the edge of the counter. The Defendant told her to "get back" and aimed his rifle at her. She complied and stepped behind a rack of chips. The Defendant, while continuing

to aim his rifle at Ms. Garcia, instructed her to come out from behind the rack and stand in a certain spot within his sight. The Defendant yelled repeatedly at Ms. Luna to “hurry up” and said that he would not hurt anybody if they did what he said. Ms. Garcia said that when Mr. Nickens exited the restroom, the Defendant aimed the rifle at Mr. Nickens and told him to stand beside Ms. Garcia. She said that the Defendant was shaking “awful bad” and that she kept looking at his finger on the trigger of the rifle. She thought that if the Defendant was startled, he could “easily” pull the trigger due to his shaking. She stated the Defendant pointed the rifle at her the whole time except for when he ordered Mr. Nickens to stand beside her.

After watching the recording of the incident, Ms. Garcia acknowledged that the rifle was not pointed at her the whole time and that the Defendant had not shoved her as far as she remembered. She further acknowledged the discrepancy between her testimony that the Defendant had said he would not hurt anyone if they complied with his demands and her written police statement providing the Defendant had only said he “d[idn’t] want to hurt anyone,” without mention of their compliance. Ms. Garcia reiterated that the Defendant was not there for hers or Mr. Nickens’ money but had still held them at gunpoint and had not allowed them to leave while he robbed the store. She further stated that the Defendant “would have probably killed” them if they had tried to leave.

Ms. Garcia testified that she felt like a “prisoner” during the incident. She stated that she believed the Defendant was going to shoot her if she did not comply with his demands. She said that the incident “seemed like it took forever” and that she wondered if this would be the last day of her life. Ms. Garcia stated that she had never experienced anything “this traumatic” and that the Defendant had “mentally killed” something inside of her. She stated that she had trouble sleeping, did not leave her house alone at night anymore, always had to sit facing the door, and had to remind herself that the Defendant was in jail when she saw someone with a similar stature.

Mr. Nickens testified that when he entered Smiley’s Market on May 27, 2016, he went to the restroom located at the back of the store. When he exited the restroom, he saw a man with a rifle holding two women at gun point. When the Defendant saw Mr. Nickens, he ordered Mr. Nickens to move where the women were located at the front of the store. He stated that the Defendant was “holding the gun as if he would shoot it.” Mr. Nickens acknowledged that the Defendant said he did not want to hurt anyone and that the Defendant did not fire the rifle. Nevertheless, Mr. Nickens thought that guns were “killing machines” and that he would have been shot if he had not complied with the Defendant’s demands. Mr. Nickens stated he felt confined to the spot where the Defendant had ordered him to stand and felt like he could not leave.

When the Defendant left the store, Mr. Nickens relayed the Defendant's vehicle information to Ms. Luna, who had called 911. He stated that he believed the Defendant drove off alone toward Dickson County in a red and black Nissan truck with duct tape over the license plate. From Mr. Nickens' experience with firearms, he believed the Defendant had a "deer rifle."

Mr. Nickens agreed that the Defendant was robbing the store. He stated that the incident felt like it lasted ten minutes but acknowledged that the video timer reflected fifty-eight seconds in total. He affirmed that the video timer showed him exiting the restroom with twenty-four seconds remaining on the recording. He further agreed that the stress of the situation could have made the incident seem like ten minutes.

Corporal Michael Foust of the Cheatham County Sheriff's Office ("CCSO") testified that he responded to the armed robbery call. Corporal Foust was advised that a vehicle matching the suspect's vehicle had wrecked on a blind curve. Corporal Foust located the vehicle and the suspect. The State entered a photograph of the Defendant's wrecked vehicle as an exhibit.

Corporal Foust stated that as he passed the vehicle on the curve, he observed the suspect putting items into a white bag. After stopping on the scene, Corporal Foust attempted to handcuff the suspect, but the suspect resisted. A struggle ensued. Corporal Foust stated that the suspect attempted to pull Corporal Foust's gun from its holster and that the suspect also attempted to re-enter the vehicle where a rifle was located.

After the suspect was detained, Corporal Foust located the white bag he had seen. A photograph of the contents of the bag that showed "several bills" of currency and Marlboro cigarettes was entered as an exhibit. Another photograph of the inside of the Defendant's truck was entered that showed the "stock part" of a "long gun." Corporal Foust identified the Defendant in court as the suspect. Corporal Foust acknowledged that the Defendant might have yelled for Corporal Foust to shoot him at some point during their encounter.

CCSO Detective Jeff Landis testified that on May 27, 2016, he worked in the criminal investigative unit which investigated, among other crimes, robberies. Detective Landis stated he responded to the armed robbery at Smiley's Market. At the scene of the Defendant's vehicle wreckage, Detective Landis observed scattered one, five, and ten-dollar bills around the truck, as well as a "huge" amount of Marlboro cigarettes. The State entered the money and cigarettes collected at scene as an exhibit. Detective Landis testified that he recovered a dark gray mask, a camo hat, and a wood grain 742 Remington .30-06 semi-automatic rifle. Detective Landis stated this type of firearm was capable of shooting

several different types of ammunition, was often used in the local area to hunt deer, and was a “highly calibered” weapon. When he recovered the rifle from the wrecked truck, he removed the magazine from the rifle and a round from the chamber. He stated the rifle appeared to be functioning. Three rounds of .30-06 ammunition were also recovered from inside the vehicle. The State entered the rifle as an exhibit.

After collecting the evidence at the scene of the Defendant’s wrecked truck, Detective Landis went back to Smiley’s Market and recorded the surveillance footage of the incident. He testified that the evidence—including the clothes, rifle, money, cigarettes, and truck—all matched the items in the video and descriptions of the witnesses. He further stated the truck had a piece of duct tape on the corner of the license plate. Detective Landis identified the Defendant in court.

Detective Landis additionally collected the shirt the Defendant was wearing. Detective Landis stated that the shirt had two pockets on the front that were “flipped up” on the Smiley’s Market’s recording and that the shirt had a similar pattern as that seen on the recording. The State entered the Defendant’s shirt as an exhibit.

Detective Landis acknowledged that he had only sought a warrant against the Defendant for aggravated robbery and that the kidnapping charges were added later. He stated, however, that the recording “plainly” showed the Defendant armed with a rifle, twice ordering Ms. Garcia where to stand and not allowing Mr. Nickens to leave. Detective Landis acknowledged that the rifle was never tested to confirm whether it was capable of firing. He further agreed with defense counsel’s calculations that the Defendant was in Smiley’s Market with the victims for approximately “0.05 percent of one day” and that Ms. Garcia was only forced to move approximately seven feet.

At the conclusion of the State’s proof and outside the presence of the jury, defense counsel moved for a judgment of acquittal, arguing that neither Ms. Garcia nor Mr. Nickens suffered significant confinement or removal. The trial court denied the motion and then addressed the Defendant’s request for a special jury instruction filed on August 16, 2018. The requested jury instruction stated, “The conduct prescribed by Tennessee’s Kidnapping statute cannot be characterized as ‘relatively trivial restraints.’ A restraint is not sufficient to meet the requirements of our law.” The trial court denied the request.

Relative to this appeal, the jury was charged with the following instructions for aggravated kidnapping:

For you to find the defendant guilty of the lesser offense of aggravated kidnapping with a deadly weapon, the state must have proven beyond a reasonable doubt:

(1) that the defendant knowingly removed or confined Connie L. Garcia [and Johnathan Nickens] unlawfully so as to interfere substantially with her [and his] liberty; and

(2) that the defendant possessed or threatened the use of a deadly weapon.

A removal or confinement is “unlawful” if it is accomplished by force, threat or fraud. Although the law requires no specific period of time of confinement or distance of removal, a removal or confinement “interferes substantially” with another’s liberty if the time of confinement is significant or the distance of removal is considerable.

“Deadly weapon” means a firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

“Force” means compulsion by the use of physical power or violence.

“Violence” means evidence of physical force unlawfully exercised so as to damage, injure or abuse. Physical contact is not required to prove violence. Unlawfully pointing a deadly weapon at an alleged victim is physical force directed toward the body of the victim.

“Fraud” is defined as the term is used in ordinary conversation and includes, but is not limited to, deceit, trickery, misrepresentation and subterfuge.

“Knowingly” means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result. The requirement of “knowingly” is also established if it is shown that the defendant acted intentionally.

“Intentionally” means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person’s conscious objective or desire to engage in the conduct or cause the result.

On August 16, 2018, the jury found the Defendant guilty of the aggravated kidnappings of Ms. Garcia and Mr. Nickens.

At a subsequent sentencing hearing, the Defendant was sentenced to eleven years for the aggravated robbery count and to eleven years for each of the aggravated kidnapping counts. The three counts were ordered to run consecutively for an effective thirty-three-year sentence. The judgments were filed on October 17, 2018.

On November 15, 2018, defense counsel filed a motion for new trial. The Defendant challenged, *inter alia*, the sufficiency of evidence supporting his aggravated kidnapping convictions and the denial of the requested special jury instruction concerning “trivial restraints.” The trial court denied the motion by written order entered on January 25, 2022. This timely appeal followed.

II. ANALYSIS

A. Sufficiency of the Evidence

Here, the Defendant argues that the evidence was insufficient to support his aggravated kidnapping convictions. Specifically, he argues that there was no significant confinement or removal of the victims and that the kidnappings were entirely incidental to the underlying crime of robbery. The State contends that the evidence was sufficient, arguing that Tennessee’s kidnapping statute only requires a substantial interference with liberty and not a specific timeframe of confinement or distance of removal and that the Defendant’s kidnapping offenses were not inherent to his robbery offense.

The United States Constitution prohibits the states from depriving “any person of life, liberty, or property, without due process of law[.]” U.S. Const. amend. XIV, § 1. A state shall not deprive a criminal defendant of his liberty “except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). In determining whether a state has met this burden following a finding of guilt, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Because a guilty verdict removes the presumption of innocence

and replaces it with a presumption of guilt, the defendant has the burden on appeal of illustrating why the evidence is insufficient to support the jury's verdict. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). If a convicted defendant makes this showing, the finding of guilt shall be set aside. Tenn. R. App. P. 13(e).

“Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact.” *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Appellate courts do not “reweigh or reevaluate the evidence.” *Id.* (citing *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978)). “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). Therefore, on appellate review, “the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom.” *Cabbage*, 571 S.W.2d at 835.

As pertinent here, the Code defines aggravated kidnapping as false imprisonment “[w]hile the defendant is in possession of a deadly weapon or threatens the use of a deadly weapon.” Tenn. Code Ann. § 39-13-304(a). False imprisonment occurs when “[a] person . . . knowingly removes or confines another unlawfully so as to interfere substantially with the other’s liberty.” *Id.* § 39-13-302(a). A person “acts knowingly with respect to the conduct or to the circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist.” *Id.* § 39-11-302(b). Although no specific period of time of confinement or distance of removal is required, a removal or confinement “interferes substantially” with another’s liberty if the time of confinement is significant or the distance of removal is considerable. *State v. White*, 362 S.W.3d 559, 576-77 (Tenn. 2012). Even if a defendant does “not have a deadly weapon in his or her possession, but threatened the victim with the use of a deadly weapon, the offense would be punishable as an aggravated kidnapping under this section.” *Id.* § 39-13-304, Sentencing Comm’n Cmt.

Here, viewed in the light most favorable to the State, the evidence established that the Defendant entered Smiley’s Market in Cheatham County armed with a loaded rifle. While robbing Ms. Luna, the Defendant aimed a loaded rifle at both Ms. Garcia and Mr. Nickens. Specific to Ms. Garcia, the Defendant aimed the loaded rifle at her, with his shaking finger on the trigger, and demanded she move aside. When Ms. Garcia complied and backed behind a rack of chips, the Defendant again ordered her at gunpoint to stand in a specific spot within his sight. When Mr. Nickens exited the restroom, the Defendant aimed the rifle at him “as if he would shoot it” and ordered Mr. Nickens to stand next to Ms. Garcia. The Defendant continued to confine both Ms. Garcia and Mr. Nickens to that spot at gunpoint until completing the robbery. Both Ms. Garcia and Mr. Nickens testified

that they believed the Defendant would have shot them had they not complied with his demands, with Ms. Garcia additionally stating that she felt like a “prisoner.”

Our law requires no specific time period for confinement or distance for removal and the jury did not accredit the Defendant’s argument that the time of confinement of Ms. Garcia and Mr. Nickens for nearly a minute at gunpoint was not a significant interference with their liberties. Tenn. Code Ann. § 39-13-302(a); *White*, 362 S.W.3d at 576; *State v. Green*, No. E2018-00350-CCA-R3-CD, 2019 WL 2714490, at *12 (Tenn. Crim. App. June 28, 2019) (affirming an aggravated kidnapping conviction where the defendant interfered substantially with the victim’s liberty “over the course of a couple of minutes”). Further, the brevity of incident was not attributable to the Defendant, but to Ms. Luna, who complied with the Defendant’s demands and quickly retrieved the cash and Marlboro cigarettes.

As to the Defendant’s argument that the kidnappings were entirely incidental to the robbery, our supreme court has held that the kidnapping of one victim is never “essentially incidental” to an offense perpetrated against a separate victim. *State v. Teats*, 468 S.W.3d 495, 503 (Tenn. 2015) (quoting *White*, 362 S.W.3d at 580) (holding that the due process concerns when a defendant is charged with kidnapping and robbing the same victim are not present when a defendant is charged with kidnapping and robbing different victims). The Defendant’s confinement of Ms. Garcia and Mr. Nickens was not “inherent[ly] necess[ary]” to the robbery against Ms. Luna and, as such, was an independently significant act. *See id.* at 505. We conclude that a reasonable jury could have found the evidence sufficient to support both of the Defendant’s aggravated kidnapping offenses. The Defendant, therefore, is not entitled to relief on this issue.

B. Jury Instruction

The Defendant argues that the trial court erred by refusing to instruct the jury on “relatively trivial restraints,” which was, in his opinion, germane to the jury’s understanding of the elements in Tennessee’s aggravated kidnapping statute. The State responds that the Defendant was not entitled to this special jury instruction because he was charged with robbing and kidnapping separate victims and because the given instructions fairly stated the applicable law.

A defendant has a right to “a correct and complete charge of the law governing the issues raised by the evidence presented at trial.” *State v. Brooks*, 277 S.W.3d 407, 412 (Tenn. Crim. App. 2008) (citing *State v. Forbes*, 918 S.W.2d 431, 447 (Tenn. Crim. App. 1995)). The trial court is tasked with providing this “complete charge” to the jury. *State v. James*, 315 S.W.3d 440, 446 (Tenn. 2010) (quoting *State v. Harbison*, 704 S.W.2d 314,

319 (Tenn. 1986)). The jury instructions must correctly, fully, and fairly set forth the applicable law. *Brooks*, 277 S.W.3d at 412. The instructions must be reviewed in their entirety rather than examining individual phrases in isolation. *Id.*

A special jury instruction is given “to supply an omission or correct a mistake made in the general charge, to present a material question not treated in the general charge, or to limit, extend, eliminate, or more accurately define a proposition already submitted to the jury.” *State v. Adams*, 405 S.W.3d 641, 661 (Tenn. 2013) (quoting *State v. Cozart*, 54 S.W.3d 242, 245 (Tenn. 2001), *overruled on other grounds by White*, 362 S.W.3d at 559). “When the general charge fully and fairly sets forth the applicable law, a special instruction is unnecessary.” *State v. Fayne*, 451 S.W.3d 362, 373 (Tenn. 2014) (citing *State v. Hanson*, 279 S.W.3d 265, 280 (Tenn. 2009)). As such, a trial court’s refusal to deliver a special instruction is error only if the charged instruction “fails to fairly submit the legal issues or if it misleads the jury as to the applicable law.” *Id.* (quoting *State v. Vann*, 976 S.W.2d 93, 101 (Tenn. 1998)). Moreover, pattern jury instructions are “merely suggestions,” and trial courts are not required to use them when instructing a jury. *State v. Harris*, 839 S.W.2d 54, 74 (Tenn. 1992) (citations omitted). Because challenges to a trial court’s jury instructions are a mixed question of law and fact, our review is de novo with no presumption of correctness. *Fayne*, 451 S.W.3d at 373.

Here, the Defendant requested the following jury instruction, partially derived from *State v. White*: “The conduct prescribed by Tennessee’s Kidnapping statute cannot be characterized as ‘relatively trivial restraints.’ A restraint is not sufficient to meet the requirements of our law.” *See* 362 S.W.3d at 576. In *White*, our supreme court mandated jury instructions to cure due process concerns on whether a removal or confinement in a kidnapping case substantially interfered with a victim’s liberty to a greater degree than necessary to commit an accompanying felony. *Id.* at 580-81. The Defendant uses the same argument that necessitated those instructions in *White* for his requested special jury instructions in this case—that his kidnapping offenses were “essentially incidental” to the underlying crime of robbery. However, as explained above, the kidnapping of one victim can never be “essentially incidental” to an offense perpetrated against a separate victim. *Teats*, 468 S.W.3d at 503 (quoting *White*, 362 S.W.3d at 580). Our supreme court clarified in *Teats* that the instruction necessitated in *White* under that reasoning was not required in cases where a defendant is charged with robbing one victim and kidnapping a separate victim. *Id.* Therefore, the Defendant was not entitled to a special jury instruction merely because he kidnapped Ms. Garcia and Mr. Nickens while also robbing Ms. Luna. *See id.* at 505.

Moreover, the Defendant argues that the trial court’s refusal to deliver the special instruction was prejudicial and denied the jury a full understanding of the “time and trivial

restraints” elements in Tennessee’s kidnapping statute. As explained above, however, our kidnapping laws do not require a specific time of confinement or distance for removal. *See* Tenn. Code Ann. §§ 39-13-302(a), -304(a); *White*, 362 S.W.3d at 576. The trial court charged the jury as suggested by the pattern jury instructions and included the instruction that “[a]lthough the law requires no specific period of time of confinement or distance of removal, a removal or confinement ‘interferes substantially’ with another’s liberty if the time of confinement is significant or the distance of removal is considerable.”

These pattern instructions adequately set forth the applicable law for the jury that a confinement or removal must “interfere substantially” with another’s liberty and removed the Defendant’s concern for a kidnapping conviction based on merely “trivial restraints.” *See* 7 Tenn. Prac. Pattern Jury Instr. T.P.I.—CRIMINAL 8.02 (26th ed. 2022). As such, the Defendant has failed to establish that the special instruction was necessary or that the trial court’s refusal to deliver it deprived him of a correct and complete charge of the law. *Fayne*, 451 S.W.3d at 373 (citing *Hanson*, 279 S.W.3d at 280); *Brooks*, 277 S.W.3d at 412. The Defendant, therefore, is not entitled to relief on this issue.

III. CONCLUSION

Based upon the review of the record as a whole, we affirm the judgments of the trial court.

KYLE A. HIXSON, JUDGE